STATE OF MICHIGAN

COURT OF APPEALS

KENNETH D. POSS,

Plaintiff-Appellee,

v

LAURIE J. POSS, M.D.,

Defendant-Appellant.

UNPUBLISHED
May 1, 2003

No. 236513
Oakland Circuit Court
LC No. 97-002640-CZ

Before: Gage, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from entry of a judgment. This case arises out of a lawsuit wherein plaintiff sued his sister for failure to pay interest owed on several loans plaintiff made to her. We vacate the judgment entered and remand.

On the morning of the scheduled trial, the parties reached a settlement, which was placed on the record. Both parties acknowledged their agreement and understanding of the settlement. This entire settlement is clearly, concisely, and unambiguously set forth in the transcript.

Under the settlement, defendant agreed to pay plaintiff the sum of $190,000. The agreement provides in pertinent part:

> *Mr. Bernstein* (appellant's counsel): She will pay him forty-five thousand forthwith. There is a condominium in Boca Raton, Florida which is titled in Dr. Laurie Poss's name and upon which she has been making the mortgage payments. The parties will determine the fair market value of that condominium, that amount will be added to the forty-five thousand and Dr. Laurie Poss will execute a deed to that condominium over to the brother, who, in turn, will make the mortgage payments and hold her harmless from any loss resulting from this failure to do so. …
>
> *Mr. Bernstein*: Whatever the balance is Dr. Kenneth Poss has graciously, in my opinion, indicated may be repaid upon any terms which the defendant selects within sixty days, and *he made the statement it can be over twenty years*. The payment terms will be decided within sixty days, but Dr Laurie Poss will have *full discretion to set those terms*. The condition to that is, that the debt not be dischargeable in the event that Dr. Laurie Poss were to file for bankruptcy

> later, it would be the intention of the parties that this debt be exempted from the bankruptcy. That I believe is the complete settlement. (Emphasis added.)

Plaintiff thereafter prepared the written judgment, which defendant refused to approve because it did not comport with the settlement language as placed on the record. Plaintiff proposed to enter a judgment that included a statement that defendant "acknowledged" having breached certain fiduciary duties. Obviously defendant objected to entry of the same. There was no such agreement placed on the record and defendant denied having made any acknowledgment of any breach of fiduciary duties. Further, defendant contended that the settlement agreement did not contemplate entry of a judgment because the parties had entered into a written settlement contract, and therefore, this case should have been dismissed. A hearing was held on September 8, 2001, in which the trial judge inquired of defendant as follows:

> Counsel have you got any other way we can assure that this is not dischargeable in bankruptcy?
>
> * * *
>
> *Mr. Bernstein*: Perhaps some kind of collateralization of personal assets, for example, would create the same effect. That's one way.
>
> I am willing to put in all kinds of language about how she should be estopped to raise any defenses to this not being dischargeable in bankruptcy, all of that.

The judge however decided that since he could not think of any other way to make it "bankruptcy-proof," he would enter the language that plaintiff placed in the proposed judgment. Thus, notwithstanding the fact that there had been no agreement for the kind of admission plaintiff desired on the part of the defendant, plaintiff now sought, and received the assistance of the court in making, a deal he had not earlier obtained.

In addition, defendant, pursuant to the settlement agreement, elected to pay the settlement over twenty years in annual installments. Plaintiff claimed this was unreasonable and asked the court to hold her in contempt. The judge held a hearing in that regard and, again notwithstanding the agreement that had originally been placed on the record, entered an order enforcing the proposed judgment and requiring defendant to pay the balance of the money owed to plaintiff in either one of two ways: (1) monthly payments over five years with no interest, or (2) monthly payments over seven years at six percent annual interest. This, again along with the other language, was entered over defendant's objections.

It is basic Michigan law that an agreement or consent between parties is binding if that agreement or settlement is made in open court on the record. MCR 2.507(H). Since the courts have long favored compromises of pending controversies, the court will not disturb these agreements absent satisfactory evidence of mistake, fraud, or unconscionable advantage. *Michigan Nat'l Bank v Packman*, 119 Mich App 772, 778; 327 NW2d 355 (1982); see also *Michigan Neutral Ins Co v Indiana Ins Co*, 247 Mich App 480; 637 NW2d 232 (2001). In *Packman*, the Court held that a consent that is properly entered into is entitled to final and binding effect. With regard to any discrepancy between the settlement terms placed on the

record and those contained in the written order of judgment, they must be resolved by consideration of the record. *Id*. at 779. In this case, the parties negotiated and entered into a settlement agreement that was placed on the record in open court. Nowhere in that settlement did defendant agree to admit a breach of a fiduciary duty. Further, nowhere in that agreement did she promise to pay within five or seven years. A court may not modify a settlement in the absence of fraud, duress, or mutual mistake. *Marshall v Marshall*, 135 Mich App 702; 355 NW2d 661 (1984). None of these considerations are applicable here.

In the case before us, the trial court erred in putting his own spin on the settlement that was placed on the record. There was clearly an agreement on the record that defendant would not discharge this debt in bankruptcy; likewise, there was a clear understanding placed on the record that defendant would have up to twenty years in which to repay the debt. The trial judge cavalierly ignored both of these and this was error.[1]

The judgment is vacated, and this matter is remanded to the trial court for judgment to be entered according to the settlement terms placed on the January 3, 2001 record. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ William B. Murphy
/s/ Kathleen Jansen

[1] Defendant also raised a jurisdictional question in her pleadings in the circuit court but she has abandoned that issue on appeal since it is not contained in the Questions Presented. See *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).